

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
Petition for Declaratory Ruling Regarding)	
Revocation of Prior Express Consent for)	
Non-Telemarketing Calls)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

PETITION FOR EXPEDITED DECLARATORY RULING

BURTON D. BRILLHART
bbrillhart@mcglinchey.com
McGlinchey Stafford PLLC
2711 N. Haskell Ave, Suite 2750
Dallas, Texas 75204

Telephone: (214) 445-2445
Facsimile: (214) 445-2450

LAUREN E. CAMPISI
lcampisi@mcglinchey.com
McGlinchey Stafford PLLC
601 Poydras St., 12th Floor
New Orleans, LA 70130

Telephone: (504) 596-2761
Facsimile: (214) 910-9121

DUSTIN D. GODENSWAGER
dgodenswager@mcglinchey.com
McGlinchey Stafford PLLC
25550 Chagrin Boulevard, Suite 406
Cleveland, OH 44122

Telephone: (216) 378-4988
Facsimile: (216) 916-4301

CHAD R. FULLER
chad.fuller@troutmansanders.com
Troutman Sanders LLP
11682 El Camino Real, Suite 400
San Diego, CA 92130

COUNSEL FOR SANTANDER CONSUMER USA, INC.

July 10, 2014

TABLE OF CONTENTS

	Page
I. SUMMARY	2
II. THE TCPA, THE COMMISSION’S REGULATIONS AND ITS PRIOR RULINGS ARE UNCLEAR WHETHER PRIOR EXPRESS CONSENT TO RECEIVE NON-TELEMARKETING COMMUNICATIONS IS REVOCABLE.	4
III. IF THE COMMISSION DECIDES TO INTERPRET THE TCPA TO INCLUDE A RIGHT TO REVOKE PRIOR EXPRESS CONSENT, IT MUST ALLOW CALLERS TO DESIGNATE A REASONABLE METHOD THAT CREATES A WRITTEN RECORD TO REVOKE PRIOR EXPRESS CONSENT.	9
A. ALLOWING CALLERS TO DESIGNATE THE METHOD FOR REVOKING CONSENT IS CONSISTENT WITH THE TCPA AND ITS GOALS.	10
B. ALLOWING CALLERS TO DESIGNATE THE METHOD FOR REVOKING PRIOR EXPRESS CONSENT IS CONSISTENT WITH OTHER CONSUMER PROTECTION STATUTES.	12
IV. CONCLUSION	15

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
Petition for Declaratory Ruling Regarding)	
Revocation of Prior Express Consent for)	
Non-Telemarketing Calls)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

PETITION FOR EXPEDITED DECLARATORY RULING

Pursuant to Section 1.2 of the Federal Communications Commission’s (the “Commission”) rules¹, Santander Consumer USA, Inc. (“Santander”) hereby respectfully submits this Petition for Expedited Declaratory Ruling to clarify and confirm the meaning of “prior express consent” with respect to non-telemarketing calls to cellular telephones under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

Specifically, Santander requests that the Commission clarify and confirm that “prior express consent” to receive non-telemarketing calls and text messages to cellular telephones sent using an automatic telephone dialing system (“ATDS”) and/or an artificial or prerecorded voice message cannot be revoked. Alternatively, if the Commission decides to interpret the TCPA to include a right to revoke “prior express consent” to receive non-telemarketing communications, Santander respectfully requests that the Commission confirm that the caller may designate one or more of the following methods that the consumer must use to effectively revoke “prior express consent”: (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller; and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology.

¹ 47 C.F.R. § 1.2.

I. SUMMARY

Santander is a leading company in the United States' automotive finance sector. Santander, like many other consumer-facing businesses, depends on the lawful use of modern telephone technology to communicate with its customers throughout the duration of its relationships. These communications include calls made by Santander to the telephone numbers its customers have provided in connection with their accounts.

The TCPA allows companies like Santander to call their customers' cellular telephone numbers using an ATDS or an artificial or prerecorded voice message if the customers have provided prior express consent.² Congress did not define "prior express consent" but authorized the Commission to interpret the provisions of the TCPA. The Commission has consistently ruled that "prior express consent" to receive non-telemarketing calls includes persons who knowingly release their phone numbers and thereby, in effect, have given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.³ The Commission has also addressed the meaning of "prior express consent" in the context of a debtor-creditor relationship. Specifically, the Commission ruled that calls made using an ATDS or an artificial or prerecorded message to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party.⁴ These rulings reflect the careful balance sought by the TCPA in protecting privacy interests and preventing abusive telemarketing practices while permitting the legitimate use of technology for "normal business communications" between businesses and their customers.

² See 47 U.S.C. § 227(b)(1)(A).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769 para. 31 (1992).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 567-68, para. 16-17 (2008).

Nowhere in the TCPA, the Commission's regulations or its prior rulings is there a right for consumers to revoke "prior express consent" to receive non-telemarketing communications. Where Congress and the Commission have intended such a right, it is clearly provided. For example, the TCPA was amended in 2005 to create a right for recipients of unsolicited facsimile advertisements to revoke their consent to receive additional facsimile advertisements and the regulations implementing this provision provide the exclusive methods for exercising the right to revoke consent.⁵ Similarly, the 2012 amendments to the TCPA regulations include a right to revoke consent to receive artificial or prerecorded telemarketing messages and provide a specific automated opt-out method for exercising that right.⁶ The lack of any similar provision applicable to non-telemarketing calls makes clear that there is no right to revoke "prior express consent" to receive non-telemarketing calls.

Notwithstanding the text of the TCPA, the Commission's regulations and its prior rulings, some courts have held that "prior express consent" is revocable in the context of non-telemarketing communications.⁷ These interpretations have created a massive surge in TCPA

⁵ Junk Fax Prevention Act of 2005, Pub.L. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1849 para. 48 (2012).

⁷ See e.g. *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (determining from the TCPA's silence regarding the means of providing or revoking consent that Congress sought to incorporate the common law concept of consent generally allowing oral revocation in addition to written revocation), and *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3rd Cir. 2013) (noting that the TCPA is silent regarding the question of whether a consumer may revoke its consent and, if so, whether there is any temporal limitation on the right to revoke prior express consent, but focusing on the common law concept of consent in determining that a consumer does have a right to revoke consent). But see *Chavez v. Advantage Group*, 959 F. Supp. 2d 1279 (D. Colo. Aug. 5, 2013) (finding that consent could not be withdrawn under the TCPA), and *Saunders v. NCO Financial Systems, Inc.*, 910 F. Supp. 2d 464 (E.D.N.Y. Dec. 21, 2012) (holding that there is no provision in the TCPA that allows withdrawal of a voluntarily-given, prior express consent to call a cell phone number). For other cases finding that a person may revoke consent both orally and in writing, see *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 (W.D. Wis. June 20, 2013); *Adamcik v. Credit Control Services*, 832 F. Supp. 2d 744 (W.D. Tex. Dec. 19, 2011); and *Gutierrez v. Barclays Group*, 2011 U.S. Dist. LEXIS 12546 (S.D. Cal. Feb. 9, 2011). For additional cases finding that a person may only revoke consent in writing, see *Andersen v. Harris & Harris, LTD*, No. 13-CV-867-JPS, 2014 U.S. Dist. LEXIS 54953, fn. 7 (E.D. Wis. Apr. 21, 2014); *Kenny v. Mercantile Adjustment Bur., LLC*, No. 1:10-cv-1010, 2013 WL 1855782, at *6 (W.D.N.Y. May 1, 2013); *Moore v. Firstsource Advantage, LLC*, 2011 U.S. Dist. LEXIS 104517 (W.D.N.Y. Sept. 15, 2011); *Moltz v. Firstsource Advantage, LLC*, 2011 U.S. Dist. LEXIS 85196 (W.D.N.Y. Aug. 3, 2011); *Cunningham v. Credit Management, L.P.*, 2010 U.S. Dist. LEXIS 102802 (N.D. Tex. Aug. 30, 2010); and *Sengenberger v. Credit Control Services, Inc.*, 2010 U.S. Dist. LEXIS 43874 (N.D. Ill. May 5,

litigation seeking up to \$1,500 for each call made after the consumer allegedly “verbally revoked” “prior express consent”. In these cases, it is undisputed that the consumer provided “prior express consent.” The only issue is whether the consumer’s allegation that he or she “verbally revoked” consent, often without any documentary or other corroborating evidence, is sufficient to establish a violation. This new wave of litigation exposes businesses to crippling liability despite compliance with the statute. More importantly, these claims, based solely upon alleged verbal revocation, are unsupported by the TCPA and the Commission’s prior rulings. Accordingly, Santander respectfully requests that the Commission confirm that “prior express consent” to receive non-telemarketing communications sent using an ATDS or an artificial or prerecorded message may not be revoked.

If the Commission determines that it should create a right to revoke “prior express consent” to receive non-telemarketing communications sent using an ATDS or an artificial or prerecorded message, Santander requests that the Commission define the specific method(s) the consumer must use to exercise that right. Just as the Commission prescribed with respect to unsolicited facsimile advertisements and artificial or prerecorded telemarketing messages, a specific method for revoking consent is needed to ensure a meaningful opportunity for compliance with the rules on the part of callers and call recipients. The best method for such revocation, if allowed, is one that follows existing consumer protection statutes and which produces a verifiable written record.

II. THE TCPA, THE COMMISSION’S REGULATIONS AND ITS PRIOR RULINGS ARE UNCLEAR WHETHER PRIOR EXPRESS CONSENT TO RECEIVE NON-TELEMARKETING COMMUNICATIONS IS REVOCABLE.

Congress enacted the TCPA in 1991 to curb abuses by telemarketers and to protect the privacy of consumers. From the beginning, these goals have been balanced against the important

2010): *Starkey v. Firstsource Advantage, LLC*, No. 07-CV-662A, 2010 U.S. Dist. LEXIS 60955(W.D. N.Y. Mar. 11, 2010).

need to allow businesses to communicate with their own customers. This balance is evident in the authority granted to the Commission to create certain exemptions from the call restrictions, the established business relationship exemption provided by the TCPA with respect to unsolicited facsimile advertisements, the opt-out mechanisms provided under the TCPA with respect to unsolicited facsimile advertisements and the structure of the Do-Not-Call Registry. As the Commission has recognized for more than a decade, the TCPA was not intended to restrict businesses from placing informational and other non-telemarketing calls to their customers, including to their cellular telephones. Santander requests that the Commission expressly confirm that consumers who provide “prior express consent” to receive non-telemarketing calls on their cellular telephone numbers made using an ATDS or an artificial or prerecorded message cannot subsequently revoke that consent.

The TCPA allows companies like Santander to call their customers’ cellular telephone numbers using an ATDS or an artificial or prerecorded voice message if the customers have provided prior express consent.⁸ Congress did not define “prior express consent” but authorized the Commission to interpret the provisions of the TCPA.⁹

The Commission first defined “prior express consent” in its 1992 Report and Order, stating:

[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.¹⁰

In connection with this 1992 Report and Order, the Commission stated that its interpretation was supported by Congressional findings “noting that in such instances ‘the called

⁸ See 47 U.S.C. § 227(b)(1)(A).

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769 para. 31 (1992).

¹⁰ *Id.*

party has in essence requested the contact by providing the caller with their telephone number *for use in normal business communications.*”¹¹

The Commission addressed the meaning of “prior express consent” in the context of a debtor-creditor relationship. In 2005, ACA International (“ACA”), an international trade organization of credit and collection companies, submitted a Petition for an Expedited Clarification and Declaratory Ruling seeking clarification of and a declaratory ruling regarding the meaning of “prior express consent.” The Commission issued its Declaratory Ruling in 2008 confirming that calls made using an ATDS or an artificial or prerecorded message to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the “prior express consent” of the called party.¹² The Commission further ruled:

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the “prior express consent” of the called party, we clarify that such calls are permissible. *We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.* In the [1992 FCC Ruling], the Commission determined that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” The legislative history in the TCPA provides support for this interpretation... We emphasize that “prior express consent” is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.¹³

Therefore, pursuant to the Commission’s rulings, a creditor has “prior express consent” to call a consumer’s cellular telephone using an ATDS or artificial or prerecorded message when the

¹¹ *Id.* at n. 57 (quoting H.R. Rep. No. 102-317, at 13 (1991) (emphasis added)).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 567-68, para. 16-17 (2008).

¹³ *Id.* at 564-65, para. 9-10 (emphasis added).

consumer provides that number to the creditor. These rulings reflect the careful balance sought by the TCPA in protecting privacy interests and preventing abusive telemarketing practices while permitting the legitimate use of technology for informational calls between businesses and their customers.

Nowhere in the TCPA, the Commission's regulations or its prior rulings is there a right for consumers to revoke "prior express consent" to receive non-telemarketing communications. Where Congress and the Commission have intended such a right, it is clearly provided. This is evident in the 2005 amendments to the TCPA and the 2012 amendments to the TCPA regulations. In 2005 Congress amended the TCPA to create a right for recipients of unsolicited facsimile advertisements to revoke their consent to receive additional facsimile advertisements and the regulations implementing this provision set forth the exclusive methods for exercising the right to revoke consent.¹⁴ Similarly, the 2012 amendments to the TCPA regulations include a right to revoke consent to receive artificial or prerecorded telemarketing messages and provide a specific automated opt-out method for exercising that right.¹⁵ At that time, the Commission explicitly declined to extend the opt-out right (and by extension, the ability to revoke consent) to non-telemarketing calls stating:

While a few commenters assert that we should apply the automated, interactive opt-out requirement to both non-telemarketing and telemarketing calls, (internal citation omitted) we decline to do so at this time because the record does not reveal a level of consumer frustration with non-telemarketing calls that is equal to that for telemarketing calls. We therefore *limit the automated, interactive opt-out requirement* that we adopt today to *autodialed or prerecorded telemarketing calls*.¹⁶

¹⁴ Junk Fax Prevention Act of 2005, Pub.L. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)).

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1849 para. 48 (2012).

¹⁶ *Id.* (emphasis added).

The lack of any similar provision applicable to non-telemarketing calls clearly reflects the Commission's position that "prior express consent" to receive non-telemarketing calls cannot be revoked.

Despite the language of the TCPA, the Commission's regulations and its prior rulings, some courts have concluded that a consumer may revoke "prior express consent" in connection with non-telemarketing communications.¹⁷ Without specific guidance and clarity by the Commission confirming that no such right exists under the TCPA¹⁸, businesses are subject to staggering liability for calls placed to existing customers who have provided "prior express consent" to be contacted at their respective telephone numbers based on the customer's unsupported assertion that he or she "verbally revoked" "prior express consent" at some point prior to the call.¹⁹ Even the most sophisticated compliance management system cannot prevent

¹⁷ See *Osorio*, 746 F.3d at 1255 (determining from the TCPA's silence regarding the means of providing or revoking consent that Congress sought to incorporate the common law concept of consent generally allowing oral revocation in addition to written revocation), and *Gager*, 727 F.3d at 270 (noting that the TCPA is silent regarding the question of whether a consumer may revoke its consent and, if so, whether there is any temporal limitation on the right to revoke prior express consent, but relying on the common law concept of consent in determining that a consumer does have a right to revoke consent).

¹⁸ It is important to note that confirming the TCPA does not allow borrowers to revoke "prior express consent" will not leave borrowers without a mechanism to stop unwanted collection calls from their creditors. Under the Fair Debt Collections Practices Act, federal and state prohibitions against unfair, deceptive and abusive acts and practices and many state laws governing creditor communications with borrowers, a borrower may demand that his creditor cease collections communications. Thus, the clarification Santander seeks is only that the TCPA does not allow for revocation of "prior express consent."

¹⁹ Each telephone call made without "prior express consent" is a separate violation of the TCPA and subjects companies to a penalty of \$500 for a negligent violation, or \$1,500 for a knowing or willful violation. 47 U.S.C. § 227. Given the volume of calls companies make, the potential exposure could be devastating to these businesses. Settlements of these claims have resulted in staggering amounts paid in the millions of dollars. See e.g. *In re Rose v. Bank of America Corp.*, No. 5:11-cv-02390-EJD (N.D. Cal. 2013) (agreeing to settle several class action lawsuits that accuse the bank of using automated dialing systems to send phone calls and text messages without prior express consent for \$32 million); *Jiffy Lube Int'l Inc. Text Spam Litigation*, No. 11-MD-2261-JM-JMA, Dkt. No. 97 (S.D. Cal. 2012) (obtaining final approval of \$35 million settlement for TCPA claims based on marketing text messages allegedly sent without prior express consent); *Arthur v. Sallie Mae, Inc.*, No. 2:10-cv-00198 (W.D. Wash. 2012) (settling for \$24.15 million claims that Sallie Mae knowingly made nonemergency automated calls to their cellphones seeking to collect debt payments without their express consent); *Malta v. Wells Fargo*, No. 10-cv-01290 (S.D. Cal. 2012) (agreeing to a \$17 million settlement to resolve the action claiming that account-holder customers were contacted on their cellphones without prior express consent using an automatic telephone dialing systems and a prerecorded voice to provide account services for its home mortgages and auto loans); *Adams v. AllianceOne, Receivables Management, Inc.*, No. 3:08-cv-00248 (S.D. Cal. 2012) (obtaining approval of a \$9 million settlement of claims alleging that the company placed telephone calls to the plaintiffs' cellphones without prior express consent using an automatic telephone dialing system).

against this type of claim or the enormous exposure it creates. As courts and the Commission have acknowledged: “It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.”²⁰ This result does not support the goals of protecting consumers against telemarketing abuses or protecting privacy interests for which the TCPA was enacted.

Santander respectfully requests that the Commission provide clear guidance to all businesses that place non-telemarketing calls and text messages to existing customers that “prior express consent” to receive non-telemarketing calls using an ATDS or an artificial or prerecorded message cannot be revoked.

III. IF THE COMMISSION DECIDES TO INTERPRET THE TCPA TO INCLUDE A RIGHT TO REVOKE PRIOR EXPRESS CONSENT, IT MUST ALLOW CALLERS TO DESIGNATE A REASONABLE METHOD THAT CREATES A WRITTEN RECORD TO REVOKE PRIOR EXPRESS CONSENT.

If the Commission decides to interpret the TCPA to include a right to revoke “prior express consent” to receive non-telemarketing calls using an ATDS or an artificial message, Santander requests that the Commission confirm, consistent with the text of the TCPA and Congressional intent, that the caller may designate the exclusive but reasonable methods that its existing customers must use to effectively exercise that right. Specifically, Santander requests that the Commission confirm that the caller may designate one or more of the following exclusive methods for revoking “prior express consent” to receive non-telemarketing calls and text messages sent to their cell phones using an ATDS and/or artificial or prerecorded message: (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller; and/or (5) as prescribed

²⁰ *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19219, para. 9, n. 32 (2004).

by the Commission hereafter as needed to address emerging technology. Santander requests that the Commission confirm that the caller may require the consumer to confirm his or her identity through reasonable authentication procedures, identify the account number(s), if applicable, and/or the telephone number(s) for which the consumer is revoking “prior express consent.”

Just as a consumer may provide and then revoke “prior express consent,” the consumer may later provide “prior express consent” after effectively revoking that consent. This subsequent provision of “prior express consent” is necessary so that consumers who realize the benefits of receiving these communications have an opportunity to request them and so that businesses who comply with the consumer’s request to be contacted are not penalized for doing so. Santander respectfully requests that the Commission provide clarity throughout this process.

A. ALLOWING CALLERS TO DESIGNATE THE METHOD FOR REVOKING CONSENT IS CONSISTENT WITH THE TCPA AND ITS GOALS.

The designation of an exclusive method by which a consumer may revoke consent to be contacted is not new to the TCPA. In fact, the TCPA allows for a similar procedure in connection with telemarketing communications in the form of opt-out procedures.

For example, in 2005 the TCPA was amended to allow the businesses to send unsolicited facsimile advertisements as long as the sender had an established business relationship with the recipient.²¹ At the same time, the 2005 amendment allowed the recipients of those unsolicited facsimile advertisements to make a request to the sender not to send any future unsolicited advertisements to a telephone number.²² As a result of these amendments, the TCPA and its implementing regulation allow telemarketers to designate a telephone number, facsimile number, website address or e-mail address to which a consumer who receives an unsolicited facsimile advertisement must deliver his opt-out notice.

²¹ Junk Fax Prevention Act of 2005, Pub.L. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)).

²² *Id.*

Specifically, the TCPA requires facsimile advertisements to include an opt-out notice stating the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request is unlawful.²³ The TCPA and its implementing regulation confirm that the request not to send future unsolicited advertisements to a telephone facsimile machine is effective only if:

- (a) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
- (b) The request is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and
- (c) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.²⁴

Accordingly, even with respect to unsolicited telemarketing efforts, Congress recognized that revocation of consent is effective only when delivered to the location designated by the sender. A similar opt-out procedure applies to telemarketing calls using an artificial or prerecorded message.²⁵ There should be no advantage given to telemarketers who were the sole target of the TCPA. If “prior express consent” to receive non-telemarketing communications may be revoked, businesses also should be allowed to designate a reasonable method by which consumers may revoke “prior express consent.”

The TCPA expressly provides this clarity to telemarketing calls because it was enacted and intended to address telemarketing abuses, not transactional communications between businesses and their existing customers. Allowing verbal revocation creates an uncontrollable

²³ 47 U.S.C. § 227(b)(2)(D)(ii); 47 C.F.R. § 64.1200(a)(4)(iii)(B).

²⁴ 47 U.S.C. § 227(b)(2)(E); 47 C.F.R. § 64.1200 (a)(4)(v).

²⁵ 47 C.F.R. § 64.1200(a)(7)(i)(A)-(B).

environment in which undocumented assertions are made and businesses must struggle to defend against costly litigation for calling their existing consumers who provided “prior express consent” to be called in connection with their account(s) but later allege to have orally revoked consent without any evidence supporting that claim. If the Commission decides to interpret the TCPA to include a right to revoke “prior express consent” to receive non-telemarketing calls, Santander urges the Commission to resolve this situation and to protect consumers and legitimate non-telemarketing communications by proving a reasonable, documented process by which a consumer may revoke his “prior express consent” consistent with the TCPA.

B. ALLOWING CALLERS TO DESIGNATE THE METHOD FOR REVOKING PRIOR EXPRESS CONSENT IS CONSISTENT WITH OTHER CONSUMER PROTECTION STATUTES.

Allowing callers to designate a reasonable method for revoking “prior express consent” is consistent with several consumer protection statutes and regulations that allow businesses to designate a specific address or process to handle specific types of consumer requests.

The Consumer Financial Protection Bureau (“CFPB”) is the most recent federal agency to address this issue in its newly promulgated mortgage servicing rules. The new mortgage servicing rules allow mortgage servicers to designate an exclusive means by which consumers may assert errors, request information or submit “qualified written requests” regarding the servicing of their mortgage loans.²⁶ Specifically, the new rules allow mortgage servicers to establish an address that a borrower must use to submit a written notice of error, request for information or qualified written request.²⁷ The designation of only a mailing address was intentional. When the CFPB originally proposed its rule, it contemplated allowing these notices

²⁶ See 12 C.F.R. § 1024.35(c); 12 C.F.R. § 1024.36(b); 12 U.S.C. § 2605(e).

²⁷ *Id.*

and requests to be made by borrowers either orally or in writing.²⁸ However, in its final rule, the CFPB allowed consumers to submit these important requests for information and to notify servicers of alleged errors only if those requests and notices are submitted *in writing to the address designated by the mortgage servicer*.²⁹

The CFPB acknowledged its final rules were guided by commenters who explained that applying these requirements to oral notices would create new burdens regarding tracking and monitoring.³⁰ These commenters “further stressed that a written process would provide more clarity and certainty as to the nature of the error the borrower asserted and the communications from the servicer to the borrower during the conversation.”³¹ Finally, the commenters explained that “written notices of error would help avoid situations in which the borrower and servicer have differing recollections as to the content of the borrower’s notice of error and the servicer’s response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk ... [and] recording conversations could be especially costly for small servicers and would require the borrower’s consent in many jurisdictions.”³² After considering these reasonable and insightful comments, the CFPB limited its final rule to a written process, which it concluded “strikes the appropriate balance between ensuring responsiveness to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error.”³³ The Commission should recognize this same balance with respect to the TCPA by clarifying the consumer’s right to revoke “prior express

²⁸ 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal; Proposed Rule, 77 Fed. Reg. 57200, 57309 - 57310 (Sept. 17, 2012) (amending 12 C.F.R. § 1024).

²⁹ See 12 C.F.R. § 1024.35(c); 12 C.F.R. § 1024.36(b); 12 U.S.C. § 2605(e).

³⁰ Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10738 (Feb. 14, 2013) (amending 12 C.F.R. § 1024).

³¹ *Id.*

³² *Id.*

³³ *Id.*

consent” in writing, by email message, text message or facsimile at the address or number designated by the caller.

This process is consistent with other federal consumer protection statutes, which likewise did not provide for oral communication.³⁴ The Fair Debt Collection Practices Act (“FDCPA”)³⁵ includes specific procedures by which a consumer can demand *in writing* that a debt collector cease all communications.³⁶

The Fair Credit Reporting Act (“FCRA”)³⁷ also allows a furnisher of consumer information to *designate an address* to which the consumer must submit a dispute *in writing* regarding the accuracy of information furnished to consumer reporting agencies.³⁸ This process allows for a definitive record upon which businesses may rely. Without such a definitive record, businesses cannot ensure compliance with the TCPA and are needlessly exposed to potentially devastating liability.

As evidenced by these various consumer protection statutes, allowing callers to designate a specific method for revoking “prior express consent” strikes the appropriate balance between

³⁴ See e.g., the Homeowners Protection Act of 1998, 12 U.S.C. § 4902(a)(1) (requiring a borrower to submit a request in writing to initiate cancellation of private mortgage insurance); the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1024(b)(4) (providing that the administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated); the Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.524(b)(1) (allowing covered entities to require that individuals who make requests for access do so in writing, provided they inform individuals of such a requirement); Uniform Commercial Code § 4-403 (providing that a stop-payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in a record within that period).

³⁵ 15 U.S.C. §§ 1692a *et seq.*

³⁶ 15 U.S.C. § 1692c(c) (“If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except— (1) to advise the consumer that the debt collector’s further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.”).

³⁷ 15 U.S.C. §§ 1681 *et seq.*

³⁸ 15 U.S.C. § 1681s-2(a)(8)(D) (“A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that (i) identifies the specific information that is being disputed; (ii) explains the basis for the dispute; and (iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.”).

protecting the privacy of consumers and allowing legitimate communications between businesses and their own customers who have provided their “prior express consent” to be called. This type of process provides consumers with a simple, clearly defined way to effectively seek relief. At the same time, this type of process allows consumer-facing businesses, like Santander, to create an effective system to identify, track and comply with consumer requests and with the TCPA.

IV. CONCLUSION

Express clarification from the Commission is necessary to resolve inconsistent interpretations of the TCPA and to confirm that consumers cannot revoke “prior express consent” to receive non-telemarketing calls on their cell phones using an ATDS or an artificial or prerecorded message. Santander requests that the Commission provide this much needed clarity to allow consumer-facing businesses both to communicate with their customers and to comply with the TCPA.

If the Commission decides to interpret the TCPA to include a right to revoke “prior express consent” to receive non-telemarketing communications, Santander respectfully requests that the Commission confirm that the caller may designate one or more of the following methods that the consumer must use to effectively revoke “prior express consent”: (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller; and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology. This approach is consistent with the text of the TCPA, the Congressional history surrounding its enactment, the prior regulations and rulings issued by the Commission and the goals of the statute – to protect privacy interests, prevent telemarketing abuses and allow legitimate business communications.

Respectfully submitted,

McGLINCHEY STAFFORD PLLC

By: /s/ Burton D. Brillhart

BURTON D. BRILLHART

bbrillhart@mcglinchey.com

2711 N. Haskell Ave, Suite 2750

Dallas, Texas 75204

Telephone: (214) 445-2445

Facsimile: (214) 445-2450

LAUREN E. CAMPISI

lcampisi@mcglinchey.com

601 Poydras St., 12th Floor

New Orleans, LA 70130

Telephone: (504) 596-2761

Facsimile: (214) 910-9121

DUSTIN D. GODENSWAGER

dgodenswager@mcglinchey.com

25550 Chagrin Boulevard, Suite 406

Cleveland, OH 44122

Telephone: (216) 378-4988

Facsimile: (216) 916-4301

CHAD R. FULLER

TROUTMAN SANDERS LLP

chad.fuller@troutmansanders.com

11682 El Camino Real, Suite 400

San Diego, CA 92130

Telephone: (858) 509-6056

Facsimile: (858) 509-6040

***COUNSEL FOR SANTANDER CONSUMER
USA, INC.***